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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS C. SWEZEY,

Defendant and Appellant.

D045681

(Super. Ct. No. SCE235078)

APPEAL from a judgment of the Superior Court of San Diego County, Christine K. Goldsmith, Judge. Affirmed.

Thomas C. Swezey appeals his convictions of robbery (Pen. Code, § 211), vehicle theft (Veh. Code, § 10851, subd. (a)), and receiving stolen property (Pen. Code, § 496, subd. (d)). He contends the court erred in failing to modify CALJIC No. 2.92 to delete language telling the jury they could consider the certainty of an eyewitness's identification, and in failing to grant a mistrial when a witness referred to his "booking photo." We affirm.

FACTS

On November 11, 2003, James Robinson, a friend and neighbor of Swezey's, made two trips to a nearby convenience store. During one trip, he saw Swezey checking the door handle of a car belonging to Chay Lau. Swezey asked Robinson if he had a coat hanger. Robinson, concerned about Swezey's behavior, told his uncle about the incident and his uncle's fiancé called the police to report the activity. Later, Robinson saw Lau's car parked in Swezey's driveway.

About 9:00 to 9:30 p.m., Lau reported to the police that his grey Toyota Celica with license plate number 2UEX894 had been stolen. The police officer who responded to the report, before talking to Robinson and Lau, saw a grey car similar to Lau's car parked in Swezey's driveway but could not see the license plate of the car because most of the car was covered by a tarp. After the officer spoke for five to 10 minutes with Lau and Robinson, he returned to Swezey's house. The car was no longer in the driveway. Swezey's mother told the officer the car was not stolen, that Swezey had traded his pickup truck for the car that day.

The following evening, at approximately 5:00 p.m., restaurant employee Kathleen Steffler was at the cash register when Swezey entered the restaurant, walked directly to the register and said, "Give it to me." She was startled and did not immediately respond. He repeated himself and said, "I'm not kidding" and pulled his right hand out of his pocket exposing the handle of what Steffler assumed was a gun. She gave him a bank money bag containing about \$400. He fled out the door. Another employee, who had seen Steffler toss the money bag to Swezey, followed Swezey into the parking lot. The

employee wrote down the license plate number of the car, the same number as Lau's stolen car. Steffler provided the police with a description of the robber, his clothing, and his car.

About 9:00 p.m., the police brought Steffler to the Swezey residence for a curbside line-up. She identified Swezey as the robber, stating, "Yeah, that's him. Positively, absolutely." On December 15, 2003, Steffler identified another individual as the robber from a photographic line-up using driver's license photographs. On January 20, 2004, Steffler identified a different individual as the robber during a live line-up. At trial, in May 2004, Steffler testified she believed Swezey was the robber, based on her memory of the robber's face.

The police found Lau's car, covered by a tarp, on a street near the Swezey residence. The steering column of the car appeared to have been tampered with. Inside the car, the police found two knives belonging to Swezey's brother. The brother had given the knives to Swezey the previous day and Swezey had not returned them. The police did not find a gun, the money bag, or the clothing Swezey had worn during the robbery.

When Swezey was interviewed by the police about 11:00 p.m., after having been given his *Miranda*¹ rights, he said he could not remember where he had been between 4:30 and 5:00 p.m. that night. He said that for the past two days, he had been driving a 1987 Honda Civic and said it was then parked outside his house. When the police told

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

him they had not seen a vehicle matching that description, Swezey said his girlfriend had stolen his car two weeks ago and he was not sure where it was located.

DISCUSSION

I

CALJIC No. 2.92 - Certainty of Witness's Identification

Swezey contends the court erred in instructing the jury, pursuant to CALJIC No. 2.92,² that a witness's level of certainty is a factor the jury may consider in assessing the accuracy of the identification. He cites a number of studies questioning the correlation between a witness's level of certainty and the accuracy of an identification. There are several problems with Swezey's argument.

First, Swezey did not raise this issue below. Indeed, when the court went through each factor listed in CALJIC No. 2.92, defense counsel expressed no objection to the factor addressing witness certainty, apparently agreed with the court's assessment it should be given, and, although invited by the court to submit additional language to CALJIC No. 2.92, did not do so. Thus, any error here can be viewed as an error invited by counsel that is not cognizable on appeal. (See *People v. Catlin* (2001) 26 Cal.4th 81, 150.) Alternatively, the error, even if constitutionally based, may be viewed as waived

² In pertinent part, CALJIC No. 2.92 states: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following: [¶] . . . [¶] . . . "The extent to which the witness is either certain or uncertain of the identification."

since there was no objection made nor attempt to modify the instruction. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1196, fn. 6 [defendant waived a constitutional claim by failing to raise it below]; *People v. Cole* (2004) 33 Cal.4th 1158, 1211.)

Second, the California Supreme Court has approved the factors listed in CALJIC No. 2.92. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1232 [instruction on the certainty or uncertainty of a witness's identification not improper when expert testified without contradiction that confidence in an identification does not correlate with accuracy]; *People v. Wright* (1988) 45 Cal.3d 1126, 1141 [approving of CALJIC No. 2.92]; *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303, disapproved on another ground in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [interpreting Supreme Court decisions as rejecting argument it is improper to instruct the jury on the witness's level of certainty].)

Moreover, even if we were to distinguish the Supreme Court cases and find that, in this particular case, the court erred, we would not reverse since any error was harmless. There was only one witness, Steffler, who identified Swezey as the robber. While she was "absolutely" positive of her identification of Swezey as the robber at the time of the curbside line-up, she identified two other people as the robber at the photographic and live line-ups. Thus, the jury had before it evidence demonstrating a witness's level of certainty did not necessarily mean the witness would be accurate in an identification.

Furthermore, there was abundant other evidence tying Swezey to the crimes. Robinson, who knew Swezey, saw him trying the door handles of Lau's car and later saw Lau's car in Swezey's driveway. Lau had not given Swezey permission to take his car.

The person who robbed the restaurant made his getaway in Lau's car. Lau's car was later located near Swezey's house covered by a tarp. Inside the car were two knives that Swezey had borrowed from his brother the day before. Swezey's claim that he had traded a truck for the car was inconsistent with his claim his girlfriend had stolen that car two weeks earlier. There was overwhelming evidence establishing that Swezey stole Lau's car on November 11 and used it the next day to rob the restaurant. Steffler's eyewitness identification was but one additional piece of evidence and not crucial to the verdict.

There is no reasonable probability the jury would have returned a different verdict had CALJIC No. 2.92 been modified to delete reference to a witness's level of certainty.

II

Reference to "Booking Photo"

Prior to trial, the court granted a motion to bifurcate the trial on prior serious felony convictions.³ At trial, Officer Andrew Harman testified after he interviewed Steffler about the robbery, he returned to the police station to get a photograph of Swezey and he found "a booking photo from the Department of Justice." He also testified when he saw Swezey later at his residence he recognized Swezey "from the booking photo."

After Officer Harman testified, the defense moved for a mistrial based on the officer's references to a "booking" and "Department of Justice" photograph. The trial court denied the motion, noting the officer "did not explain what a Department of Justice

³ The court subsequently made true findings on these prior convictions and subsequently struck two of the three convictions.

photo was" and that while the officer referred to a "booking photo," the jurors probably assumed Swezey had been booked into jail given the robbery charge and never seeing him in the hallway. In denying the motion, the court also noted the lack of emphasis placed on the photo. Defense counsel declined the court's offer to admonish the jury because she did not want to call further attention to the references.

Swezey argues the court should have granted the motion for a mistrial because the jury was exposed to his prior criminality, thus prejudicing his case.

" ' "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." ' " (*People v. Lucero* (2000) 23 Cal.4th 692, 713-714.) A motion for a mistrial should be granted "only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) "[I]n reviewing the trial court's ruling, we use the deferential abuse of discretion standard." (*People v. Davis* (2005) 36 Cal.4th 510, 553.)

Here, we find no abuse of discretion. The references to a "Department of Justice" or "booking" photo were brief and not emphasized. The officer did not explain what was a "Department of Justice" photo. The testimony constituted, at most, an oblique and passing reference to prior criminality. We do not find unreasonable the trial court's determination that the jurors would have placed little weight on the references. Moreover, this was not a close case; there was abundant evidence establishing Swezey stole Lau's car and committed the restaurant robbery. There is no reasonable possibility

the jury's verdict was a result of these brief references or that the verdict would have been different had the officer not referred to a "Department of Justice" and "booking" photo. (Compare *People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581 [reference to parole status did not warrant a mistrial in light of overwhelming evidence establishing defendant's guilt].)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.